Supreme Court, U.S.
FILED
JUN 29 1995
OFFICE OF THE CLERK

No. 94-1772

In The

Supreme Court of the United States

October Term, 1994

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL NO. 441,

Petitioner,

vs.

INTERSTATE BRANDS CORPORATION, MERITA BREAD DIVISION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Interstate Brands Corporation, Merita Bread Division,[1] respectfully files this Brief in Opposition to the Petition for Certiorari.

[1] Respondent has no parent companies, or subsidiaries or affiliates, required to be disclosed pursuant to Supreme Court Rule 29.1.

THE "QUESTIONS PRESENTED" ARE ARGUMENTATIVE

The Petitioner's statement of "Questions Presented" (Pet. i) does not comply with Supreme Court Rule 14 because, among other things, it is argumentative. It incorrectly refers to a trial *de novo* when the facts concerning collecting, handling, and testing the Grievant's urine sample, and the certification by the Medical Review Officer of it as positive for marijuana, were not materially in dispute and there was no trial *de novo*. Nor did "both parties unreservedly submit to the arbitrator an issue requiring interpretation of federal regulation [sic] in order to determine whether the contractual standard of just cause for discharge has been met." (Pet. i) There was no formal submission and no agreed on issue; the parties, rather, presented to arbitration the *grievance* wherein the Grievant alleged: "Statement of grievance: I was terminated without just cause." (Pet. A-20) The Arbitrator, whether rightly or wrongly, could have declined to interpret the DOT Regulations, 49 CFR Part 40. He could have simply deferred to the Medical Review Officer's interpretation, or he could have ruled that question of interpretation to be one for judicial determination.[2] Instead, he framed the issue on his own initiative to be "specifically . . . whether the urine test of May 25, 1993 meets the criteria of the Department of Transportation standards . . . " (Pet. A-4) and decided that question of law, which is external to the union contract.

---

[2] *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 615, 629-30 (1989); *Bi-State Development Agency*, 88 LA 854, 860 (1987) ("The Arbitrator . . . will leave this legal conclusion to the proper authority, the appropriate court.")

The argumentative wording of the Questions Presented obscures the essential nature of the holding below, which was that the award "does not draw its essence from the contract, but rather reflects the arbitrator's 'own brand of industrial justice,' [and] went beyond the collective bargaining agreement and undertook to interpret the DOT regulations" (Pet. A-6), and furthermore did so incorrectly (Pet. A-7 *et seq.*).

"STATUTES INVOLVED" ARE MISQUOTED BY PETITIONER AND INCOMPLETE

The Petition misquotes Labor-Management Relations Act § 203(d), 29 U.S.C. § 173(d), which says "final *adjustment* by a method agreed on by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement," not "final *judgment*" as erroneously quoted on Pet. 1.[3] We point out that this language encourages arbitration *only* when it is final, *i.e.*, not when an award is properly subject to vacatur, and *only* when it is over interpretation or application of the union contract and not, as here, federal regulations.

The Petition omitted to mention two statutes which are involved in this case: the Omnibus Transportation Employee Testing Act of 1991, § 2(3), P.L. No. 102-143, 105

[3] Respondent's Waiver of Right to File Brief in Opposition, previously filed, directed attention to the error on Pet. ii naming the United States Department of *Labor* as an *amicus curiae* below when it should have read United States Department of *Transportation*.

Stat. 917, 952-53, (Oct. 28, 1991); and the Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. §§ 31136(a)(1), (3); 31306(b),(i). These statutes read in pertinent part as follows:

Omnibus Transportation Employee Testing Act of 1991, § 2(3):

> (3) [T]he greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, whether on duty or off duty, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses.

Commercial Motor Vehicle Safety Act of 1986:

> 49 U.S.C. § 31136. United States Government regulations
>
> (a) Minimum safety standards. – Subject to section 30103(a) of this title, the Secretary of Transportation shall prescribe regulations on commercial vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles. At a minimum, the regulations shall insure that –
>
> (1) commercial motor vehicles are maintained, equipped, loaded, and operated safely; . . .
>
> (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; . . .
>
> 49 U.S.C. § 31306. Alcohol and controlled substance testing . . .
>
> (b) Testing program for operators of commercial motor vehicles. – (1)(A) In the interest of

commercial motor vehicle safety, the Secretary of Transportation shall prescribe regulations not later than October 28, 1992, that establish a program requiring motor carriers to conduct pre-employment, reasonable suspicion, random, and post-accident testing of operators of commercial motor vehicles for the use of alcohol or a controlled substance in violation of law or a United States Government regulation.

* * *

(i) Other regulations allowed – This section does not prevent the Secretary of Transportation from continuing in effect, amending, or further supplementing a regulation prescribed before October 28, 1991, governing the use of alcohol or a controlled substance by commercial motor vehicle operators.

REPLY TO PETITIONER'S STATEMENT OF THE CASE

Petitioner's Statement of Facts attempts to create the impression that the Arbitrator chose between possible interpretations of just cause. That is not the case. Rather, he expressly conditioned consideration of that question of contractual interpretation on his first finding that the DOT regulations had been followed to his satisfaction: "More specifically, the issue is whether the urine test of May 25, 1993 meets the criteria of the Department of Transportation standards and, *if so*, whether the penalty of discharge is appropriate?" Pet. A-24 (emphasis added). He then proceeded to interpret and apply the DOT regulations in a manner contrary to that of the Medical

Review Officer, who is the person vested by the regulations with that function. Having determined, erroneously, that the test did not comply with the regulations, the Arbitrator purported to "invalidate" the test and never even reached the question of just cause. Moreover, the remedy imposed by the arbitrator, mention of which is conspicuously absent from petitioner's brief, required the employer to reinstate the Grievant to his job as a truck driver *unconditionally*. The arbitrator's "invalidation" of the test, of course, was not binding on the DOT; indeed, the test result had been certified as valid in accordance with the DOT regulations. Consequently, compliance with the award would have required Respondent to violate the DOT regulations, which state that a person who has tested positive for marijuana is medically disqualified to drive a truck, and would have subjected Respondent to civil or criminal legal sanctions. 49 CFR § 390.37.

The arbitrator's reason for "invalidating" the Grievant's test result was that the persons who handled the sealed package containing the sample during the time it was in the hands of the courier service did not sign the chain of custody form. However, it is only individuals *in the chain* who are required by 49 CFR Part 40 to be identified. 49 CFR § 25(k), Pet. A-30. It is only transfers from one *authorized individual or place to another* which are links in the chain. 49 CFR § 40.25(c), Pet. A-30. Unless the Court of Appeals' interpretation of the regulation to this effect is correct, the word "place" would be redundant. Mailing or courier delivery of properly sealed evidence which arrives at a laboratory with seals intact has never been held to be a link in the chain of custody nor the postman or delivery person of such a package been

required to be proved to authenticate a laboratory test of a specimen. Pet. A-9, A-11. The DOT Chain of Custody Form is regularly and in accordance with the regulations, sealed inside the box with the sealed specimen. The specimen bottle and the box are both sealed with tamper proof seals. Signatures of the post office or courier service personnel have never been required because they are not "in the chain of custody." They could not sign a chain of custody form inside the sealed box.

It is not true that the testimony at the arbitration was not recorded (Pet. 3). Petitioner made a tape of the proceeding but erased it.

The Petitioner's objection to *ex parte* affidavits (Pet. 3) is not well taken in view of the fact that these are entirely proper under Federal Rule of Civil Procedure 56, this case having been decided by the District Court on cross-motions for summary judgment. Likewise, there was nothing wrong with the Court of Appeals' reversing the *summary judgment* appealed from, on any ground properly supported by the record made under Rule 56, whether its precise legal theory was argued by the appellant or not. (Pet. 3)

The Arbitrator expressly found the following facts in his decision, which are inconsistent with his award. (Pet. A-22,23):

FACTS

* * *

> Clinical Reference Laboratory, NIDA certified, performed the test analysis for the presence of drugs *in the specimen as submitted by Grievant. The test was positive.* A Medical Review

> Officer (MRO), who is a licensed physician, Dr. Bugarin, and who is *charged with evaluating a confirmed positive test result, investigated and confirmed the result.*
>
> *. . . Dr. Bugarin also determined that the chain of custody as required had been met.* Accordingly, Dr. Bugarin reported the positive test results to the company.
>
> *The company then terminated Grievant in accord with company policy and in compliance with D.O.T. Regulations.* (Emphasis added.)

Finally, the fact (Pet. 2) that the Court of Appeals pretermitted the question whether the award violated a dominant and well-defined public policy that truck drivers who test positive for marijuana be removed from service (see 49 CFR § 391.95(c), quoted at Pet. A-22), does not remove this question from the case;[4] indeed, it furnishes an additional reason why issuance of a writ of *certiorari* would be inappropriate in this case.

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[4] On this point the Court of Appeals' opinion said (Pet. A-11, n.4):

> Because we hold that the arbitrator misapplied DOT regulations in excluding the positive drug test and the arbitration award must be set aside, we need not address whether the award violates a dominant and well-defined public policy.

REASONS FOR DENYING THE WRIT

1. There are no conflicting decisions of other circuits or state courts of last resort, nor is the decision in conflict with applicable decisions of this Court. – In fact, the contrary is true. This Court has decided consistently with the Court of Appeals' decision sought to be reviewed, all legal questions properly subsumed in the Questions Presented by the Petition. In *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) the Court said:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Following these winged words are others less familiar, but even more precisely targeted on the present case. Referring to the arbitrator's opinion, this Court said:

> . . . It may be read as based *solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission.*

363 U.S. at 597 (emphasis added).[5]

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[5] As in the present case, there was no formal submission specifying issues in *Enterprise Wheel*, only submission of a *grievance*, which in *Enterprise Wheel* was court ordered, *Steelworkers v.*

Furthermore, in *Skinner v. Railway Labor Executives Ass'n* , 489 U.S. 602, 615-16 (1989), this Court flatly stated that Department of Transportation drug testing regulations are intended to supersede any arbitration award which is inconsistent with them.

> . . . [T]he Government did more than adopt a passive position toward the underlying private conduct.
>
> The regulations . . . pre-empt state laws, rules, or regulations covering the same subject matter, 49 CFR § 219.13(a) (1987), and are intended to supersede "any provision of a collective bargaining agreement, *or arbitration award* construing such agreement," 50 Fed. Reg. 31552 (1985) . . . . These are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment. (Emphasis added.)

The Court of Appeals below was fully cognizant of that principle, stating in its opinion that "Merita employed [the grievant] as an interstate truck driver subject to all the rules and regulations of the Department of Transportation ('DOT'), *binding upon the labor contract between Merita and the Union.*" Pet. A-2 (emphasis added).

A person aggrieved by a test which he alleges to have violated the regulations to his prejudice has a judicial remedy for the Constitutional tort of an unreasonable search and seizure, invoking the same jurisdiction as in

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Enterprise Wheel, 168 F.Supp. 308, at 310 (S.D.W.Va. 1958), and in this case voluntary. Therefore, the Court of Appeals in this case followed the precise precedent established by the above emphasized quotation from this Court's *Enterprise Wheel* opinion.

the *Skinner* case; the courts, not the arbitrator, *must* have the final say on whether the test violated the Fourth Amendment or the laws and regulations. *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 737 (1981):

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply, where the employee's claim is based on rights arising out of a statute designed to provide their own substantive guarantees to individual workers.

That is what the drug testing statutes and DOT regulations do. They provide minimum guarantees of reasonable searches and seizures; and whether or not they were met is not a question subject to *binding* arbitration; and an award on the question of compliance with a federal statute or preemptive regulations would be subject to *vacatur* or non-deferral as in the *Barrentine* case.

This Court's recent decision in *First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S.Ct. 1920 (1995) is fully supportive of the decision of which review is sought. The pertinent language in *First Options* is correctly summarized in the official syllabus as follows:

> Courts of appeal should apply ordinary standards when reviewing district court decisions upholding arbitration awards, *i.e.*, accepting findings of fact that are not "clearly erroneous" but deciding questions of law *de novo*; they should not, in those circumstances,

> apply a special "abuse of direction" standard. 115 S.Ct. at 1922.

The language in *Misco, Inc. v. Paperworkers*, 484 U.S. 29, 38 (1987) to the effect that so long as the arbitrator is even "arguably" construing or applying the contract the courts " . . . do not sit to hear claims of factual *or legal error* by an arbitrator as an appellate court does in reviewing decisions of lower courts" (Pet. 9; emphasis added by Petitioner) must be read to harmonize with *First Options'* holding that review of legal conclusions is *de novo*, and so read, *First Options* must hold that where the arbitrator's decision turns entirely on the interpretation and application of law, including quasi-legislative regulations, it is not in any intelligible sense of the word, "arguably" construing the contract and the appropriate standard is *de novo* review by the trial court of the legal question decided in such an award, as well as in appellate court review, for it would be nonsense to apply a different standard of review, in view of the fact that there must be error for a court of appeals to reverse a district court judgment. *First Options* therefore provides a solid basis for denying the writ.

The other Circuits have uniformly vacated labor arbitration awards reaching results contrary to DOT substance abuse testing regulations. *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 360 (3rd Cir. 1993); *Gulf Coast Industrial Workers Union v. Exxon Co.*, 991 F.2d 244 (5th Cir.1993); *DuPont v. Chemical Workers*, 968 F.2d 456 (5th Cir.1992). See also *Washington Post v. Washington-Baltimore Newspaper Guild*, 787 F.2d 604, 606 (D.C. Cir.1986):

> By now it is a familiar rule that an arbitrator's award is entitled to significant deference. Despite this rule, it is unquestionably the province of the courts to say what the law is. We need not defer to an award which contemplates a violation of law. As the instant case presents a question of statutory interpretation, we are informed by the views of the arbitrator and District Court, but we approach the task with an awareness that the final responsibility is solely our own. (Citations omitted.)

The foregoing authorities illustrate that Petitioner's prediction of the imminent demise of labor arbitration as we know it if the Court of Appeals' decision is allowed to stand is completely unfounded. Rather, the Court of Appeals simply applied the principles set forth by this Court in *Enterprise Wheel*, and applied in countless cases since that time, that an arbitrator must confine himself to interpretation and application of the collective bargaining agreement, and enforcement of his award must be refused if he fails to do so. The decision is simply a proper application of existing law, and the writ should be denied.

2. The case is not appropriate for review by this Court for the cumulative reason that the arbitration award violated a dominant, clearly defined and established public policy. – As found by the Arbitrator himself, Pet. A-22, 23, the MRO, Dr. Bugarin, who is charged by the DOT regulations with evaluating and ascertaining the correctness of the test result, investigated and confirmed that the Grievant's urine tested positive; determined that the chain of custody requirements had been

met; and reported this to the company, which "then terminated Grievant in accord with company policy and in compliance with D.O.T. Regulations."

Although the Arbitrator proceeded to make other, contradictory findings that the MRO was wrong and that the chain of custody requirements in the DOT regulations were not met (Pet. A-25, *et seq.*), he never made a finding that the Grievant was terminated without just cause. The arbitration award was certainly not binding on the DOT. Merita was bound by the MRO's decision under the regulations, a bond the Arbitrator could not loose. The DOT regulations mandated that Grievant, having been certified by the MRO as having tested positive, not be reinstated in the job of commercial truck driver. 49 CFR Part 391, § 391.95 disqualifies those who test positive for marijuana, from driving a commercial truck in the employer's service. Respondent and Grievant were subject to legal sanctions if they violated those provisions. 49 CFR § 390.37.

The power of federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested "in the Constitution, treaties, federal statutes, and applicable legal precedents." *Hurd v. Hodge*, 334 U.S. 24 (1948).

The arbitration award, unconditionally ordering Grievant to be reinstated to his job as a truck driver, after the MRO had certified he had tested positive, was contrary to a definite, well-established public policy based on explicit laws, regulations, and legal precedents. It was therefore unenforceable and subject to *vacatur*. *Exxon*

Shipping Co. v. Exxon Seamen's Union, 993 F.2d 357, 360 (3rd Cir.1993); *Iowa Electric Light & Power Co. v. Local Union 204*, 834 F.2d 1424, 1426 (8th Cir. 1987); *Gulf Coast Industrial Workers Union v. Exxon Co.*, 991 F.2d 244 (5th Cir.1993); *American Postal Workers v. U. S. Postal Service*, 632 F.2d 1280 (9th Cir.1992); *Delta Airlines v. ALPA*, 861 F.2d 665 (11th Cir.1988); *DuPont v. Chemical Workers*, 968 F.2d 456 (5th Cir.1992); *Glendale Mfg. Co. v. ILGWU Local 520*, 283 F.2d 936 (4th Cir.1960), *certiorari denied*, 366 U. S. 950 (1961); *Stead Motors of Walnut Creek v. Machinists Lodge 1173*, 843 F.2d 357 (9th Cir.1988). Respondent could not lawfully have contracted with Petitioner to disregard the MRO's findings and disobey the DOT regulations. An award that commands unconditional reinstatement, contrary to the explicit public policy that truck drivers whose positive test for marijuana was certified by the MRO may not drive a commercial truck in the employer's service, must be vacated and set aside: even if the reasons given by the Court of Appeals were insufficient and it was wrong to have pretermitted the question.[6]

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[6] Contrary to Petitioner's insistence, there is no particular significance to the fact that respondent submitted the grievance to arbitration, inasmuch as this was true in every case we have cited in which an arbitration award was set aside. After all, under the union contract, arbitration is mandatory even of frivolous grievances; even of those most lacking in and regardless of merit.

CONCLUSION

Under Supreme Court Rule 10.1 of this Honorable Court a petition for *certiorari* will be granted only when there are special and important reasons therefor. The Petitioner has shown that it is a disappointed litigant but has shown no special or important reasons for granting the writ. In fact as we have shown in this brief, such reasons do not exist. The decision below was manifestly correct not only for the reason it relied on, but for reasons it pretermitted as well. Respondent respectfully submits that the Petition is due to be denied.

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